UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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NORCAL TEA PARTY PATRIOTS, et al., Plaintiffs, - vs - INTERNAL REVENUE SERVICE, et al., Defendants.

CASE NO. 1:13-CV-341

Motions Hearing

Thursday, August 9, 2018
1:05 p.m.

Cincinnati, Ohio

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MICHAEL R. BARRETT, DISTRICT JUDGE

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P R O C E E D I N G S

THE COURT: On the docket is District Court Case Number 1:13-CV-341: *NorCal Tea Party Patriots, et al., versus the IRS, et al.*

We're here this afternoon for a motions hearing.

THE COURT: Okay. You over there with all your friends, Joe?

MR. SERGI: Yes. I'm all by myself.

(Laughter.)

THE COURT: I've got the seating chart, but just for the record will everybody identify themselves.

MR. GREIM: For the plaintiff class, Your Honor, Eddie Greim.

MR. LANGDON: David Langdon.

MR. FINNEY: Chris Finney.

THE COURT: Okay. Start over here.

MS. BENITEZ: For Lois Lerner and Holly Paz, Brigida Benitez.

THE COURT: Okay.

MS. COCKERHAM: Catherine Cockerham.

MR. HAYDEN: Mark Hayden.

THE COURT: All right. Let's go in the back.

MR. GREINER: For *The Cincinnati Enquirer*, Jack Greiner.

MR. NELSON: For *Amicus* The State of Ohio and

Attorney General Mike DeWine, Fred Nelson.

THE COURT: Okay.

MS. COTCA: For *Amicus* Judicial Watch, Ramona Cotca.

THE COURT: All right. So basically we have motions --

Oh, I'm sorry. I forgot Joe.

MR. SERGI: It happens a lot.

THE COURT: I'm looking through the screen, okay? Come on.

(Laughter.)

MR. SERGI: Joe Sergi from the Department of Justice on behalf of the United States. That's okay, Your Honor. I don't plan on saying anything.

THE COURT: We couldn't have gotten it done without you, Joe. It's okay.

All right. And I really don't care which order people speak in as long as everybody has the chance to speak and keeps it fairly contained, but basically I guess there's, what, three possible outcomes, right? Either it all gets disclosed, none of it gets disclosed, or some combination thereof where things that were actually contained in the motions themselves possibly can get disclosed, not disclosed, things like that.

So I've got a couple of questions that people can talk about: What's the standard as Brigida is going to call it, or

is it more akin to *Shane Group*. We can all talk about that.

Who wants to start? It makes no difference to me.

MR. GREIM: Your Honor, we think Lerner and Paz are the movants, so they should probably go first.

THE COURT: That's fine.

MS. BENITEZ: We're happy to do that, Your Honor.

THE COURT: Sure.

MS. BENITEZ: Your Honor, would you like me to come up to the podium?

THE COURT: It's wherever you're comfortable. If you're going to stay there, Brigida, then you might as well sit and make yourself comfortable, but just use the microphone. If you want to stand -- I know when I speak I'm nervous, so I like to stand. So it might be easier to work from the podium.

MS. BENITEZ: I'm used to standing Your Honor, so I'll come up.

THE COURT: Yeah, sure. Just ballpark how long you're going to speak for us.

MS. BENITEZ: I'm sorry?

THE COURT: How much time do you think? I'm not putting you on a leash; I just want to kind of know.

MS. BENITEZ: Five or ten minutes?

THE COURT: Perfect. Go ahead.

MS. BENITEZ: So, Your Honor, we're here today on

cross motions regarding the sealing of the depositions of Lois Lerner and Holly Paz, two individuals who were originally sued by plaintiffs but dismissed by this Court. Both cooperated, submitted to depositions. In fact, Ms. Paz was deposed twice, once during class certification and once during discovery.

Their depositions were attached to the government's Motion for Summary Judgment filed about a year ago and to the plaintiffs' opposition to the U.S. Motion for Summary Judgment which was filed September of last year. Now, before the government filed its reply brief, the parties settled all claims in October of 2017.

Your Honor, while there is a presumption of public access to judicial records under the common law and the First Amendment, we maintain that these deposition transcripts are not judicial records.

THE COURT: Can I ask a question before you go any further?

MS. BENITEZ: Yes.

THE COURT: In one of our -- we didn't have many phone conferences about discovery on this case, so, you know, I should remember all of them word for word. But in one of them I thought there was a discussion about, due to a pending lawsuit, that your clients didn't have to testify unless they had an agreement, so some form or --

Does that ring a bell or am I just making that up? I

thought that was discussed at some point, or somebody can correct me.

MS. BENITEZ: No, that's correct. And, in fact, that was -- those were the circumstances under which Ms. Paz was deposed during class certification. Because there was qualified immunity, that deposition was actually covered by an earlier protective order that was agreed to by the parties.

THE COURT: Okay. And that was just Miss Paz?

MS. BENITEZ: That was just Ms. Paz. She was deposed at that point, and then both Ms. Paz and Mrs. Lerner were deposed during discovery; but, at that point, both had been dismissed from this lawsuit.

THE COURT: And that occurred before I was on the case, right?

MS. BENITEZ: Correct.

THE COURT: Okay. All right. I'm sorry. Go ahead.

MS. BENITEZ: No. Please.

We maintain that these deposition transcripts are not judicial records. They were filed with the Court only in connection with a motion that was not fully briefed and that was not and will never be adjudicated. And that makes all the difference because there is no public right of access to those depositions.

Now, even if they were judicial records, we believe we need the *compelling reason* standard to overcome that

presumption, as I'll discuss in a little bit. But if they're not judicial records, then this Court can seal the depositions upon a showing of good cause, and we believe we've made such a showing.

We've demonstrated in the voluminous records the harassment and physical threats to Ms. Lerner and Ms. Paz and their families during the pendency of this litigation. These two women and their families have received repeated and explicit threats of bodily harm in person, by phone, by mail, by e-mail containing graphic and profane language that I will not repeat in this courtroom but that the Court is well aware of.

THE COURT: Right.

MS. BENITEZ: And as we have detailed in our material supporting our motion, harassment and death threats were so serious and credible that the authorities became involved. I can't imagine that anyone in this courtroom wouldn't be horrified if themselves or their families be the subject of such threats and repeated harassment, especially, unfortunately, in the current environment in which people often use violence to take out their frustrations on public matters.

I wanted to also set the context of what it is we're seeking. We are asking this Court to keep three, three of 233 summary judgment exhibits sealed and to keep the unredacted

versions of three summary judgment submissions sealed. Now, that's in terms of the issues relating to the case. I'm not addressing the affidavits and the briefs relating to the Motion to Seal. So that's three exhibits sealed, three redacted documents out of almost a thousand documents, both entries and attachments, in this Court's docket over five years of litigation.

So starting with the point that the documents are not judicial records.

Courts have held that what makes a document a judicial record and subjects it to the common law right of access is the role that it plays in the adjudicatory process. Now, the D.C. Circuit said in the *El-Sayegh* case that we cited that "documents that are preliminary, advisory, or, for one reason or another, do not eventuate in any official action or decision being taken" are not judicial records and the presumption of public access does not attach.

As the Court put it in that this case, if there's no judicial decision, then "documents are just documents; with nothing judicial to record." There are no judicial records.

Now, the Sixth Circuit has approvingly cited the *El-Sayegh* case in the context of student disciplinary records and has said, "There is no First Amendment or common law right of access to documents which played no role in a judicial decision."

Other Courts have been fairly consistent on this principle. The *Flagg* case out of the Eastern District of Michigan, referring to Sixth Circuit precedent and the precedent of other Circuits, said "the Courts of Appeals have uniformly recognized the distinct and more lenient standards that govern restrictions upon discovery materials, as opposed to materials submitted to and relied upon by the courts in making substantive rulings."

While the Courts said that the rights of the public kick in when the discovery materials are filed with the court, the Court also said, and I quote, "the extent of these rights depends upon the purpose for which the materials are filed and the use made of these materials by the court."

THE COURT: Can I interrupt you for a second, Brigida?

MS. BENITEZ: Of course.

THE COURT: Because I'm sure it's going to come up. So I'm sure the other side is going to argue that in order to approve the settlement I had to review and make use of the documents that were filed. What's your thought on that?

MS. BENITEZ: Well, Your Honor -- that's perfect. I was going to get to that. Not only did the Court never adjudicate the Summary Judgment Motion, but the Court here only had to determine whether the settlement is fair and adequate. The likelihood of success factor that the

plaintiffs mentioned in their briefs that is part of the larger inquiry into whether, as the Sixth Circuit has said, "the parties are using settlement to resolve a legitimate legal and factual disagreement," and the Sixth Circuit distinctly focuses on the parties' legal arguments.

The summary judgment papers are publicly available. The legal arguments therein are not redacted. So reference to the depositions of Ms. Lerner and Ms. Paz were not necessary to determine whether the settlement resolves a legitimate dispute.

And, in fact, the plaintiffs' brief in support of their motion for settlement approval didn't mention the Lerner and Paz transcripts in the discussion of the merits of their claims and instead discuss the merits of the claim only briefly and at a high level with the focus on the legal issue.

And certainly, you know, in reviewing the Court's order approving the settlement, which was just entered yesterday, the Court mentions reviewing the record but makes no mention of any review of the Lerner and Paz transcripts or, frankly, transcripts any of the witnesses.

Your Honor, I also wanted to address and started with the standard. We believe the *Shane Group* case from the Sixth Circuit is distinguishable and ultimately does not support an unsealing. And, in fact, we think that the result we seek here is consistent with *Shane Group*.

Shane Group **discusses the same presumption for judicial records in the adjudication stage. And while the Court says that the line between discovery and adjudication is crossed when the materials are put in the court record, it says nothing further on that point. It assumes those records are for purposes of adjudication, a point that cases like** ***El-Sayegh*** **elaborate on and explain that they are.**

And, in fact, the Sixth Circuit case ***In re Morning Song Bird Food Litigation*** **confirmed that the simple act of just filing a document with the Court does not transform that document into a judicial record.**

So here the deposition transcripts were not part of any adjudication even if they were, in fact, filed with the Court.

More importantly perhaps, this case is a world away from the ***Shane Group***. **As we said in our briefs, the wealth of publicly available materials here easily distinguishes this case from** ***Shane Group***. **There the Sixth Circuit vacated the District Court's sealing decision that went so far as to seal the Amended Complaint, the Plaintiffs' Motion for Class Certification, the Response thereto, and nearly 200 exhibits to the parties' filings, including an expert report that served as the keystone to the settlement and under which the expert would be compensated about $2 million. So without access to the Complaint, the class members could not even know what their legal claims were.**

So to compare *Shane Group* where almost everything was sealed to this case where almost everything is public just makes no real sense.

We think, Your Honor, that because these are not judicial documents the Court may seal upon a showing of good cause, and we've made such a showing here. The Court can properly seal the documents, you know, weighing the private interests against the public's interests and the information contained in the documents.

And the private interests here are significant. Courts have recognized that individuals have a right to physical safety that must be protected. We've shown through the affidavits that Ms. Lerner and Ms. Paz have been victims of a campaign of harassment since the initiation of this lawsuit and that they and their family members have received death threats and threats of physical harm.

Now, I mentioned earlier and we believe that, even assuming that these are judicial records, the credible death threats and other harassment provide compelling reasons to keep these transcripts sealed. Courts have ruled that safety concerns are overriding interests that outweigh the presumption of public access to judicial records.

So the Sixth Circuit in the *In re Knoxville* case, for example, said that privacy interests can outweigh the public's right of access, that "common law right of inspection has

bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of 'the painful and sometimes disgusting details of a divorce case.'"

Here we're not talking just about promoting scandal, though, I think, unfortunately, that may be part of the motivation, but it's about protecting the lives of nonparties, including children, who have been the subject of threats.

There are cases both in and outside the Sixth Circuit on point holding that threats of physical violence overcome the public's right to access documents. Now, in many of those cases the threats were potential; they were ones that the parties thought would come. They had not been actually made. Here the threats are very real, repeated, and quite disturbing.

All of these cases stand for the proposition that Courts can take whatever steps are necessary to prevent individuals from receiving public exposure when that exposure would threaten them, and the Court can still conform to the narrow-tailoring requirement.

Now, none of the cases, frankly, that have been cited by anyone, but by, you know, plaintiffs in any of the briefs mirror the facts here. Now, many of these cases involve plea agreements where the right to public access is particularly important because they contain the entire case, essentially a

substitute for trial. Some of the cases involve business-sensitive information and trade secrets; certainly important and valuable, but not as valuable as a human life.

Here this is a very different case. It's important to examine the context of the documents because there has been some mention in the plaintiffs' briefs and the *amicus* briefs, *amici*, that the public needs to understand "the conduct giving rise to the case," a phrase we've seen again and again.

Well, there are 430 entries in the docket. There are 525 attachments. So that's almost a thousand documents, virtually all of which are publicly available. So there's a 228-page Second Amended Complaint. There's the IRS's Answer. There are Motions to Dismiss. There's a -- you know, the plaintiffs filed a 103-page consolidated response to those motions. There's Court's opinion. There are just thousands of pages of briefing that are available to anyone in the public to understand the conduct giving rise to this case. All of this is public. The government produced more than 16,000 documents to plaintiffs, none of which were sealed or produced under any protective order.

Other than Ms. Lerner and Ms. Paz, plaintiffs deposed 21 former and current IRS employees. None of those depositions are sealed or otherwise under a protective order.

Again, we seek to keep three of 233 exhibits sealed and to keep unredacted versions of three summary judgment submissions

sealed, all of which have, by the way, lightly-redacted public versions.

So the public certainly has sufficient information to understand the conduct giving rise to this case. There are thousands of documents in the Court's docket, thousands of pages produced in discovery, thousands more in the greater public record that discusses, in excruciating detail, the conduct giving rise to this case.

I would point the Court's attention to the *Dish Network* case that we cited out of California. In sealing the names of confidential informants because disclosure would put their lives and safety at risk, the Court ruled that "disclosure serves no important public purpose because the other declarations and briefs related to the merit of plaintiff's motion for preliminary injunction are sufficient to put the motion and the Court's ruling in context to serve the public interest in understanding the judicial process."

Disclosure here serves no important public purpose. The public can satisfy its need for information when all the many, many documents are already available to them without putting the lives of nonparties at risk.

We also contend that the sealing of these deposition transcripts is narrowly tailored, especially viewed in the light of this enormous public record. It's true that this isn't a case about sealing the names or addresses or phone

numbers or other private information. See, that information is already out there, and it has been used by the public to harass and threaten these women and their families. Every time there is more publicity there are more threats.

In fact, I can represent to the Court that Ms. Lerner recently, in the first spate of articles, received a death threat mailed to her home when there were articles, and TIGTA is currently investigating.

It's fair to say that those threats will escalate with the release of the deposition transcripts.

Now, there's been a lot of bluster on the other side, but ultimately there is no real prejudice to the parties or to the public. The parties have litigated their case. It's done. No member of the class even objected to the multi-million-dollar settlement despite the transcripts being sealed. There is no prejudice to the public. As I just went over, the public has an extensive record that it can pour over to understand this case.

Now, I understand that they want publicity, and newspapers want to sell newspapers, and perhaps politicians running for office want to side with wealthy backers of this case, but under the law that should not override the legitimate concerns and fears for safety of two non-Ohio residents, nonparties and their families, including children.

So, at the end of the day, what we're trying to do is to

prevent an avoidable tragedy when there is no corresponding public benefit.

THE COURT: Okay. Thanks.

MS. BENITEZ: Thank you.

MR. GREIM: Your Honor, I'll probably take those issues in reverse order for you here, but I'll cover both of the key points.

The plaintiffs show from discovery that Lerner and Paz were sort of the masterminds of the misconduct that we've alleged here. We showed that they targeted the conservative applicants based on their names and their viewpoints.

Contrary to everything that we've just heard from Lerner and Paz, the content of their testimony does matter. It actually has to matter.

So in their briefing they said it doesn't matter what we said in our transcript, it's just the mere fact that people learn that our transcript has been released that will generate publicity, that will then fire up certain individuals, whoever they are out in the country, that -- that's actually their causal chain. So under their theory the content doesn't matter.

But actually, Your Honor, the content has to matter under both the two main issues today. I want to start off with that one.

I do want to address the fact that last night the Court

approved the settlement and granted final approval. It did state that it had made a thorough examination of the record. It said that there were complex factual and legal issues. And, in fact, the standard in this Circuit out of the six-factor test, the *International Union* case talks about not just legal issues, it talks about factual issues.

The Court noted the substantial discovery depositions and other things the parties had conducted in discovery, and it said the parties had the information they needed to resolve the case.

These were all arguments that we made in our motion. In fact, if you go back to our motion both for preliminary and final approval, on page 1 the very first thing we said was that an important part of this settlement is that we are now, the public is now going to be able to get all the facts about this scandal that otherwise had not come out.

We mention the fact that we had been able to depose Lerner and Paz. Then at page 11 we point to the depositions of Lerner and Paz as informing the settlement, as informing the class.

Now, it is true that in our motions for approval, Your Honor, we did not go back and reargue the case, cite the entire record. That's not what you do in that kind of a motion. We directed the Court to the record. It was our hope and expectation -- and, in fact, the Court did look at our

summary judgment papers not for purposes of deciding the summary judgment but to see what the actual issues were as part of the Court's findings.

The Court noted the many factual intricacies of the case; and, of course, the place you would find that would be in summary judgment briefing.

But, Your Honor, here's the key point.

At the heart of the intricacies that you talked about in your order last night is what Lerner and Paz did. These are not just two witnesses. Their transcripts are not just three out of, whatever it was, 400 documents. This is the explanation of the people, the two individuals who we allege orchestrated the targeting. That was our theory in this case. It was not that the White House did it or something like that. It was that Lerner and Paz did it. What we showed was, in our summary judgment papers, the animus that these individuals had against the groups. We showed that they then had the knowledge of how the groups were being targeted and that they ratified it.

I won't go through all the fact here. But with respect to Paz, for example, we argued that she had knowledge in the spring of 2010 that what were then being called Tea Party groups were being targeted, not because they had advocacy in their files but because they were members of the Tea Party movement.

We showed that Lerner was informed only a month or two later with documents showing the Tea Party was being looked at as its own issue, that there were going to be test cases and there was going to be delay. Then we showed what Lerner did in 2011 in June when she was undeniably informed of what was going on. And, you know, what did she do? Well, Lerner had said publicly that she tried to fix it. But, in fact, we showed that no, she did try to fix it; she changed the label for what was going on, and she ratified the old conduct and kept the process of delay going and, in fact, told the Cincinnati people that you're doing a good job.

So, look, Your Honor, we understand Lerner and Paz, despite the settlement and the Attorney General's apology, might adamantly disagree with everything I just said. They certainly provided testimony on all these points and more. That is what we're looking at.

At the end of the day when the American people, when the people that care about this case want to know --

"All right. Well, we've seen the e-mails. What did the people who sent these e-mails say about it? Did they mean what they said? Is this really what it appears to be?"

-- well, those are the questions that were asked and answered.

And I will not go into the content of it, obviously, but that is what the transcripts give, the capstone to all of

this. They tell us what was really motivating these two people.

THE COURT: Let me interject something then. So when you're referencing what I reviewed, what I did look at were the motions. I didn't look at the depositions in their entirety. Any distinction there?

MR. GREIM: Well, Your Honor, we certainly invited you to do it. I think that the motions --

THE COURT: Well, I didn't need to because I assumed you accurately quoted the depositions. Right?

MR. GREIM: And I believe and hope we did, Your Honor. But the other thing is, this Court has a local rule.

I guess we should -- let's go and skip that point and I'll go back in.

This Court has a rule that when you cite from a transcript, that you don't just put that page and then the signature page. You file the entire thing because the context --

THE COURT: That is so that myself and my law clerks can test the accuracy of quotations, which was not necessary because no reply was filed and no -- because of the settlement, we didn't have to get that far.

MR. GREIM: Well, Your Honor, there is no case, certainly in this Circuit -- now, I understand that we've got a difference of what the Sixth Circuit holds, but in the *Shane*

Group **and** ***Rudd*** **cases this Court does not say that we're going to go in and look and see which individual parts of one transcript were actually cited in an opinion or even cited by the parties.**

I mean, frankly, I know we filed lengthy papers. But we did have to worry about repetition and we were under some time limitation. We can't possibly cite every part that is relevant to the determination. We have to assume that the Court might go and say, "On the following page, did that witness say the opposite?" That's why we filed the whole thing. We can't know what exactly you did, but --

THE COURT: Well, it didn't come to that, Eddie. You know that.

MR. GREIM: Right. But you had to look at it for purposes of class certification. So even, Your Honor, in the Circuits that have adopted the relevance and the use standard, which are clearly some of the other Circuits, we don't see them going into a deposition transcript -- we don't have a single case where they go through and they redact parts of a transcript that weren't cited by the parties. Because, frankly, with even more time and more space we could have gone through.

I mean, you know, did we have an inquiry about whether that testimony had to be cited? Were there other parts where the person said the same thing? I mean, that would have to be

relevant, Your Honor, because at that point why would we unredact part of the transcript that mentioned the fact because it was cited when the person said the same thing two days later. At what point is -- how is that narrowly tailored? There's nothing new.

So I want to circle back to this content issue because this is the key. I think these are judicial records. We've briefed it so much, there's enough authority that I think everything we wanted to say is there. I want to go to this point.

Lerner and Paz, under their theory the content doesn't matter. And this is a key point. If you look at all of the cases, what do they say is the burden of the party trying to overcome a strong presumption? They say they've got to go document by document, page by page. And why do they do that? It's because whatever the interest is, whether it's privacy, whether it's a privilege, whatever they're relying on, physical threats, it's got to tie to something that's being said.

And, you know, now you might say at first, well, there might be an exception in these confidential informant/ undercover police cases. But there, what's the issue? The issue is the information that's their identity. It's their name. So that's the thing that puts them in danger. If they are going to be in the same prison as the person who, you

know, are the compadres of the person who committed the crime, there is all kinds of testimony that they're in trouble. They get beat up. They get picked on in prison. Those are all unique cases.

But the point is, Your Honor, in all of them, here's what they have in common. They have something that's private. They have some private information, not public official acts. They have private information, and then they've got a showing of what about that private information is going to injure them. And sometimes it's just their name.

And so what have they done in this case, Your Honor? They've departed from that. They've openly said in their brief: We're not going to take on that burden because that's not our theory.

It's enough for them that the media report on the idea that this is being released. And so --

In fact, they've even -- they've characterized the transcripts as having nothing new. They've said: Oh, people can read the actual e-mails and, you know, they can see enough of this that we don't really need it.

Well, you have to ask yourself: What's the problem then? What's the harm?

Again, under their theory, it's the, quote, "media spotlight." That is their theory. And there is no other case, there is no other case that relies on that theory.

Now, there are two reasons why, Your Honor, that has to fail. First of all, it's tied to a prediction about what people will do when they read media coverage about public official acts. And so if the theory just stopped at media coverage -- they -- they've got two bumps in their causal chain. If they just stopped at media coverage and that was the harm --

So, for example, if *The Washington Post* covers this and says "Lerner and Paz tried to keep their testimony secret" and then 500 people write comments and they write terrible things in there -- I guess I won't give any suggestions or examples, but if they write all kinds of things in the comments, that by itself is not enough. We know that.

In fact, we know that that public interest that doesn't constitute actual threats against Lerner and Paz actually raises the bar even higher for sealing. I mean, if that were all, we'd be done.

And so what the defendants want the Court to do, what Lerner and Paz want the Court to do -- excuse me -- is to go a step beyond that and basically say: In America today, when there's intense media coverage, there are just some people who come to a boil and they can't control themselves and they send off letters. They send off threats.

How many of those are true threats? I guess we shouldn't get into that in a public debate. But the point is they are

asking the Court to speculate in a way that the other cases don't.

Let me -- let's also look at the case and see where the reasoning breaks down, because what they needed to do here was show you a little bit more about the content. Now, their incidents --

Although we just learned about something new at oral argument. I'd be very curious to see exactly that this is involving Miss Lerner.

But the incidents are clustered in May of 2013 when the scandal emerged. Now, we have heard counsel say it's coterminous or it coincided with the onset of the litigation. I mean, frankly, I think we can take judicial notice that the scandal itself and the Congressional hearings have gotten far more discussion than the case itself. But May of 2013, and then there were some outliers that went as late as October of 2014.

Now, the key moments in this case, Your Honor, all postdate that.

The 2015 Motion for Class Certification, which contained all of that discovery, and the early 2016 granting of class certification, that was the most media coverage that this case has had. There were no more threats at that time.

The 2016 argument at the Sixth Circuit over the list of targeted groups, that was a major media moment. There was

nothing. There were no threats at that time.

The 2016 injunction against TPTP that Your Honor entered based on likelihood of success on the First Amendment violation, nothing there.

And then, finally, the 2017 Motion for Protective Order that Lerner and Paz filed, other than what I've just heard about here in the courtroom, there was nothing. There was nothing from that time forward other than the comments and the newspaper articles, which can't serve as the basis.

So, Your Honor, there is not even a match between publicity about Lerner and Paz and about the key facts in this case and the timing of the death threats, or whatever else you want to categorize these unpleasant messages as, that came in. They don't line up factually.

And, frankly, the far more likely explanation is that when the scandal first broke or when someone came before Congress, that that seemed to reach deeper in the public and perhaps motivated these individuals.

The point is that the Court, given the showing that they have to make, the Court should not be in the business of speculating about that. There should actually be proof that links the content to the harms.

But let me go further. There is actually even greater issue. When they don't tie their harms to content, that means they are not tying it to actually private information. And

that private information, Your Honor, undergirds every other case: undercover agent identity; their spouse's name or phone number; or the testimony of that agent or confidential informant that's going to tell the bad guys who is testifying. We've got a long, you know, hundred-year history of agents and undercover police being killed violently. That was talked about in one of the cases.

So here's what their argument really means. Their argument is purely based on threats. It's purely based on threats. They've skipped the point about private information. Because, again, this testimony is about their official conduct as agents of the United States Government. It's not about their private lives.

So, Your Honor, a showing of threat, if it were real, if any litigant did this -- and Lerner and Paz could have done this -- it could and should actually have required Lerner and Paz to seek the seal of many other things, for example: other witnesses' testimony about their conduct; their e-mails, in our view, damming e-mails disclosing their motivation behind what they did. All of those things are in the record. Those actual exhibits are in the record.

Now, Your Honor, why did those things not lead to death threats or to the other things, the other harms that are alleged here? Because those were all filed in all these years when nothing was happening until this thing we just heard

about a few minutes ago.

So, Your Honor, the point is they really would need to have -- if their theory is correct, they should have tried to seal all those materials.

In fact, why not go further than that? Why not parties' statements and briefs that are deemed to be too incendiary and that get quoted in the paper and then fire up someone sitting at home reading that? What about my argument today? It could be quoted somewhere. And, again, if this background of threat is there, it's enough, because it's not private information.

So, Your Honor, at the end of the day when you skip over this initial element of privacy and you allow official acts, official testimony about their official acts --

They are not private acts, by the way. It's not intelligence-gathering on terrorism or anything like that. This is their work at the IRS.

-- if you allow threat to be enough, then we can muzzle far more filings, far more court proceedings than is done today.

In fact -- and I won't go through the cases again. That's why we don't see a case like this. We don't see a case based purely on threat. The *Dish Network* case was an *ex parte* proceeding. There wasn't even opposing counsel to argue. The law is probably not correctly cited there. It's an unreported

decision. But even there, they actually -- it was an undercover agent scenario who was still out in the field and still working.

Your Honor, this case would be an outlier if this were to be the first Court to say that it's threat alone, threat alone will be enough, it doesn't have to be a private activity, private information, someone's identity.

Your Honor, I think with that I've covered in reverse order. Unless you have other questions, I have nothing else.

THE COURT: No, I'm good. Thanks.

Let's head to the back. Jack, do you want to be next?

MR. GREINER: Thank you, Your Honor.

THE COURT: Sure.

MR. GREINER: Just a couple of points. Your Honor, I would just like to talk about the consequences of what I think it would mean if this Court adopted Lerner and Paz's standards in two areas.

One, this judicial document theory. They basically are taking the position that if the Court -- really, they are taking the position that if the case settles while there is a pending motion that is unresolved, then that pending motion is not a judicial document. I mean, that is their argument.

That's not supported by *Shane*. In fact, *Shane* goes the complete opposite way. Bear in mind that in *Shane*, one of the documents at issue was an expert's report that was in front of

the Court only because it was attached to a *Daubert* motion which was unresolved at the time of the settlement in *Shane*. *Shane* involved settlement as well. Had *Shane* adopted Lerner and Paz's theory, it would have found that report to not be a judicial document.

So *Shane* certainly doesn't advance their cause and, in fact, by its operation, flatly contravenes their argument.

But let's just talk about for one minute the --

Besides the consequence that a settlement can essentially wipe out the history of any unresolved motion, which is absurd, let's just talk about the further consequence of their argument, which is if the Court doesn't look at this specific line in this specific record, then it is not a judicial document.

Just think about the consequence of that for a minute. Who's going to make that determination? You're going to have to take the record at issue, and then you're going to have to take the Court's determination, and then you're going to have to -- somebody, I guess the Court, will have to parse out, "Well, yeah, but I'm reading this decision, and the Court didn't really reference, you know, page 5 of the motion, so page 5 isn't a judicial record. Or it didn't really explicitly talk about Exhibit A, so Exhibit A is not a judicial record."

That is a completely unworkable system, and it's not a

surprise that there's no cases to support it.

The *Sayegh* case is completely not on point for a couple of reasons. Number one, it involved a plea agreement. In the Circuits, there's a specific way that plea agreements are dealt with. It was talked about in the *Sayegh* case. It was talked about in the *Robinson* case, which is cited in *Sayegh*. It's very limited to that specific process, number one.

Number two, the plea agreement was part of a motion that said to the Court basically: If there is a plea agreement, we don't have one yet, the defendant has never agreed to this, the defendant has not answered a plea, but if the defendant does, we want that to be under seal.

So it was really kind of a conditional filing. That's not the case with this Motion for Summary Judgment. It's not as if the Motion for Summary Judgment was presented to the Court and said, "Hey, Judge, if we file this, we're going to want it under seal."

So it's completely not on point, and I for the life of me can't figure out why it was cited other than they have nothing else so they may as well give it a shot. But the standard that they are proposing is completely unworkable.

With respect to whether it's a judicial document, of course it's a judicial document. I mean, it's kind of absurd to think otherwise.

Your Honor, with respect to their view of the compelling

need -- and I don't want to be repetitive. Again, the idea is we can't have publicity because publicity causes crazy people to make threats. So, therefore, we've been accused of this controversial behavior; and if our explanation of our role in that controversial behavior becomes public, that will fire the public up.

We're not pointing to any trade secret, confidential source information or information that needs to be statutorily remain confidential, which are the only three things that *Shane* said. That's what *Shane* is limited to by its express holding, by the way, so they can't point to any of that.

As Mr. Greim said, what they're saying is: There's going to be publicity, and when there's publicity, you know, people send us angry messages.

Okay. If that's the standard, again, let's think about the consequences of that.

That means every Ponzi scheme operator who is tried in this court is entitled to their deposition testimony being sealed because it's the same thing and probably worse. People who have lost millions of dollars, you know, might have an interest in taking some physical, you know, retribution against that Ponzi scheme operator, so we got to seal that Ponzi scheme operator's deposition.

Accused pedophile priests. I mean, that's going to cause some strong emotions. So that means, under this theory, that

the accused pedophile priest deposition testimony has to be sealed because, my goodness, the publicity is going to cause all kinds of problems.

A cop killer. I mean, I can go on and on.

It, again, is a standard that if adopted in this case is going to lead to that argument in every case, and I don't know for the life of me how you make a principled distinction.

So that's the can of worms that Lerner and Paz are asking you to open, Judge. There is no basis for it, and the implications of it are extraordinary and would lead to just an unworkable situation.

That's all I have.

THE COURT: Okay, thanks.

Fred, do you want to say something?

MR. NELSON: Yes, Your Honor, if that's all right.

THE COURT: Sure.

MR. NELSON: Thank you, Your Honor. So the question here is whether the public is entitled to know what the depositions of public officials as filed in this case involving the federal government, what the federal government has now admitted was an abuse of public governmental power, where the public is entitled to know that. And on behalf of the State of Ohio, which I believe is the only public entity to have briefed the issue in this case, the Ohio Attorney General submits that the answer is yes, the public is entitled

to know that under the case law.

The Sixth Circuit has made clear again and again that it's the vital public interest that's at stake here saying, for example, that the public interest, where the public interest relates to the conduct giving rise to the case, secrecy could, quote, "insulate the participants, masking impropriety, obscuring incompetence and concealing corruption."

And that's why the standard is so high. That's why it's a strict standard involving compelling interest, narrow tailoring and the rest.

Here the request by Ms. Lerner and Ms. Paz is to seal all of their deposition testimony for all time. And they say, well, the public can get an understanding as to what went on here by reading the Amended Complaint and other documents, presumably, the admissions of the federal authorities and so forth.

But what they're asking to shield is not simply three out of however many documents that are on the docket. It's a hundred percent of their deposition testimony. All the deposition testimony by the central actors in this scandal they say should be concealed, and that's totally contrary to what the Sixth Circuit at any rate has said that the law is in these considerations.

There are all sorts of public interests at play here. It seems to me we, as a public, have a right to try to make sure

that the IRS is not used as a political tool. Decade after decade we've tried to implement reforms to ensure that, but we are again in a taxpayer-targeting case where the government is paying out millions of dollars apparently in settlement.

As our brief noted, Ms. Lerner and Ms. Paz have said elsewhere, they've argued to other Courts that a reasonable person would not have known it was wrong to target groups on the basis of their philosophical predispositions.

The public has a right to know how folks could have thought that if the answer to that question is in the deposition transcripts that have been filed on the public record.

The publication of the depositions as filed also serves a useful purpose, it seems to me, in acting as a check on the process in that the depositions will be available to journalists and co-workers and the knowledgeable public that can check them against the facts as those individuals find them to be.

And as the Sixth Circuit has emphasized too, and this goes, I think, directly to the arguments that Miss Benitez was making on the other side, openness and public access can reduce public pressures and suspicions and to serve as something of a steam valve.

To quote the Sixth Circuit from the *Brown & Williamson* case, quote, "When the legal system is moving to vindicate

societal wrongs, members of the community are less likely to act as self-appointed law enforcers or vigilantes," which people should never do, whose conduct is disgusting and is wrong as it is illegal.

To continue to quote the Sixth Circuit, "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner."

Now, Ms. Lerner and Ms. Paz argue that no legitimate public function is served by open access here, but that's wrong. As I say, they are seeking to shield a hundred percent of their testimony. The Sixth Circuit has been very clear that the line is crossed when deposition transcripts are filed with the Court.

Shane says, as Your Honor knows, that discovery is one thing, but at the adjudication stage very different considerations apply. The line between these two stages, discovery and adjudication, "is crossed when the parties place material in the public record." And the quote goes on to say that "the public has a strong interest in obtaining the information contained in the court record."

That's the law in the Sixth Circuit today -- right? -- and the law in a great many other Circuits. It may or may not be the law in the D.C. Circuit. The D.C. Circuit acknowledged that there are other -- in the *Sayegh* case that's cited in

here, and in other Circuits, and they said, for example, the *Pansy*, P-A-N-S-Y, case out of the Third Circuit that says the existence of the right depends on, quote, "whether a document is physically on file with the court."

This issue came up just three weeks ago in the Sixth Circuit again in a case called *Woods*, a one-page decision by Judge Kethledge from July '18 which involved dismissal of a protest of administrative rule. One party, apparently contrary to the agreement with the government, filed with the Sixth Circuit a notice that attached the settlement agreement. This was not a class certification case. The Sixth Circuit didn't need to review the settlement agreement.

The government protested and said: We want this removed from the record.

And Judge Kethledge and his colleagues on the panel said: No. Settlement is already part of the public record because it was filed, and any agreements between the parties "would not overcome the public's strong interest in access to court records."

The court hadn't reviewed it. They hadn't used it to decide anything. The case was being dismissed, but it was a court record and the Sixth Circuit insisted that it remain as much.

Miss Benitez cites to the *Flagg* case, a District Court opinion that preceded *Shane* and *Rudd* and so forth. As we

noted in our brief, in that case the District Court say, quote, "As the Court explained in its May 26 decision, the Attorney General's deposition is not a judicial document, because neither it nor any other sealed materials have been filed for the purpose of securing this Court's ruling on the merits of any substantive issue."

Flagg cuts, I think, in favor of disclosure, not the other way.

The public's interest in this matter is of great significance. The Sixth Circuit in the *Signature Management* case from last year emphasized again that that's the central question that needs to be addressed.

I would note that we would deplore, of course as everyone in this courtroom would, any threats or indications of private retaliation. That, as has been said, is not the issue here. We would certainly have no objection to the Court redacting aliases, if people used them, or addresses or Social Security numbers or information regarding personal routines and that sort of thing.

The question is should the substance of the rationales and rationalizations and actions of public actors be available for public inspection having been filed with the Court in this public adjudication.

With that said, I very much appreciate the courtesy of the Court and allowing me to appear here today.

THE COURT: Thank you.

MR. NELSON: Thank you.

THE COURT: Ramona, do you want to add anything?

MS. COTCA: Very briefly, Your Honor.

THE COURT: Okay.

MS. COTCA: Good afternoon. Just to introduce to the Court Judicial Watch, because it's an *amicus* party, Judicial Watch is a nonprofit organization --

THE COURT: I read your filing.

MS. COTCA: Okay. All right. So you know the importance and the mission of the organization with respect to promoting transparency, accountability, fidelity, and integrity in government.

So I think the common theme here, at least with respect to where Judicial Watch's position is, there is a grave interest, public interest, with respect to these two depositions, or three, the depositions of Mrs. Lerner and Miss Paz.

And just to update the Court on the brief that had been filed, because we did mention a case that Judicial Watch -- it still is pending, actually, against the IRS in the District Court in the District of Columbia. Shortly after we did file the brief, we noted that part of the reason we'd like to see the depositions is to be able to put forth the argument that government misconduct is an exception to the B5, the deliberative process exemption under the Freedom of

Information Act.

Since that brief has been filed, and I don't know if there is any coincidence as to the timing, the IRS did agree to provide all of the withholdings that we were challenging.

Now, those withholdings are just a minimal portion with respect to the vast volume of records we've received in that case, and there are a lot of other withholdings from e-mail communications with Miss Paz and Miss Lerner.

That being said, I don't think our position changes in any way here because, contrary to what the attorney for Miss Paz and Miss Lerner had said, that there is no prejudice to the public, there is prejudice to the public.

Based on the litigation that we have had and still have against the IRS, we still do not have a complete record of all the e-mail records of Miss Lerner and Miss Paz. Part of our litigation on the lawsuit, there was an investigation with respect to their, Miss Lerner's anyway, missing e-mails. More than 400 backup tapes had been destroyed during our litigation when it was pending.

The deposition testimony, the words of Miss Lerner and Miss Paz with respect to their thinking and their conduct during this time that the IRS was targeting these groups, is essential and is part of that public record that the public deserves to have.

So I would argue that the public would be prejudiced if

these depositions would be sealed in perpetuity as their position is here today.

Thank you very much for your time

THE COURT: Brigida?

MS. BENITEZ: Thank you.

MR. SERGI: Actually, Your Honor, could I be heard for one second?

THE COURT: Oh, I thought you said you weren't going to say anything?

MR. SERGI: I really thought I wasn't.

THE COURT: I kind of zoned you out.

MR. SERGI: I feel I needed to correct something.

THE COURT: All right. Come on up, Joe.

MR. SERGI: Your Honor, the government, as you know, takes no position on whether it should be sealed. We didn't oppose the sealing. We didn't oppose the unsealing.

But we do believe an accurate record should be relied upon by this Court.

Both Mr. Greim and Mr. Nelson made a lot of claims that I'm not going to go into about what the case is about and what the Court held and what the parties agreed to. I will -- I know the Court should just look at the Second Amended Complaint and the settlement agreement to see what was actually agreed to in the case.

But with regard to Judicial Watch, while I do agree that

the government has waived the deliberative process --

I'm not involved in those cases. I was tangentially involved in one because I'm actually the ESI coordinator and I actually know how the computers systems work in the government, so I was an advisor in one case.

But I asked the counsel before I came out, and they informed that the government has indeed waived deliberative process on those documents. However, what made me stand up was the insinuation that somehow it had something to do with these motions because the -- I asked them for a pleading that I could give to the Court, if necessary, and it was filed on January 31st, 2018, was when the government said that it would waive reliance on deliberative process with regards to the first case cited.

So I just wanted the timing to be clear, that it was not in reaction to this motion, it was not -- that is a separate case. That case is not being handled by the attorneys who are handling this case. They are working their own case out, and I just wanted that to be clear.

Thank you, Your Honor.

THE COURT: Okay. Thank you.

Final thoughts, Brigida?

MS. BENITEZ: Yes, Your Honor. Thank you.

One thing that the other parties said have an impact as to whether or not these are judicial records. The content is not

what makes it a judicial record. We're not here to debate the merits or relevance or substance or the importance of the testimony of Ms. Lerner or Ms. Paz. We don't take any position on that.

And to the extent that plaintiffs want everyone and the public to know, you know, about their knowledge in 2010 or whatnot, there are thousands of documents, including e-mails of both Ms. Lerner and Ms. Paz, none of which have been sealed in this case.

The key is that these deposition transcripts were not used for an adjudication.

We have shown good cause, and we have shown that the privacy interest is in safety. That's at the core of the cases where testimony has been sealed or a courtroom has been sealed. It's those privacy interests that outweigh any public interest here.

And it's not just intense media coverage. It's not that there are articles. It's that these two women and their families have actually received threats, people at their homes, and other things that we've detailed in the affidavit. And contrary to what the plaintiffs have said, those threats are not stale. We have detailed that they've been ongoing and have occurred throughout this litigation, and the affidavits say as recently as this year. So those threats have been ongoing.

This is -- it's not our argument, as counsel for *The Enquirer* said in trotting out the parade of horribles, that, you know, we're wiping out the history of any unresolved motion? No. What about the 230 summary judgment exhibits that are publicly available? Those stay on the record. The summary judgment pleadings, all of that is still on the record. We are not asking about that, and we're not trying to hide any kind of role that Ms. Paz or Ms. Lerner had in these cases. That's all already publicly available.

We're here because the publicity matters, and Ohio has recognized that. I point the Court to the *Fears* case where the concern about publicity to the manufacturers of lethal-injection drugs, concern about potential negative publicity and threats that would emerge were sufficient. Here we have concrete threats, not just people writing comments to a *Washington Post* article, though there are certainly plenty of those.

I'd like to address for just a moment the *Woods* case that counsel mentioned. It makes no difference. In that case, I mean, easily distinguishable. There was a settlement agreement that was attached to a Motion to Dismiss for review. That motion was actually adjudicated by the Court and, more importantly, there was no justification given in that case for sealing. In fact, the Court said the government does not even attempt to do that. It's very different because we have

provided arguments for sealing.

The plaintiffs address the threats and call them stale, I suppose, and no one else even addressed the threats. But that's why we're here because those are significant threats and those outweigh any interest that there may be in the public knowing just a tiny bit more about this case, because there are thousands of documents out there.

And I guess I would end by saying: At the end of the day here, will it be worth it if *The Enquirer* gets to write a story if Lois Lerner is assaulted? I certainly don't think so, and we hope the Court will agree with us that it wouldn't be.

And I'd like to just make one final point that we included in the footnote, but I'd like to make sure that it's clear. We've been talking about the deposition transcripts. There are also videos of these depositions that have not been filed with the Court. Those videos, I just want to make clear our position, are not judicial records, have not been, I would assume, viewed by the Court since they've not been filed with the Court, and are not and should remain sealed regardless of the Court's decision on the actual transcripts.

Thank you, Your Honor.

THE COURT: Okay. Thanks.

All right, guys. Thanks for your attention. Appreciate it.

MS. BENITEZ: Thank you, Your Honor.

THE COURT: What's the matter?

MR. GREIM: I don't --

THE COURT: You said she was the movant. She goes last.

MR. GREIM: Fair enough, Your Honor.

THE COURT: All right. Thanks. Guys.

COURTROOM DEPUTY: This court is now in recess.

(The proceedings concluded at 2:10 p.m.)

C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

S/MARYANN T. MAFFIA, RDR

Official Court Reporter